(c) "New Mexico" and "Texas" mean the State of New Mexico and the State of Texas, respectively; "United States" means the United States of America.

(d) The term "Commission" means the agency created by this Compact for the Administration thereof.

(e) The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as the result of benificial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream.

(f) The term "Report of the Engineering Advisory Committee" means that certain report of the Engineering Advisory Committee dated January, 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact as a meeting held in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting.

(g) The term"1947 condition" means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

(h) The term "water salvaged" means that quantity of water which may be recovered and made available for beneficial use and which quantity of water under the 1947 condition was non-beneficially consumed by natural processes.

(i) The term "unappropriated flood waters" means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas.

ARTICLE III

(a) Except as stated in paragraph (f) of this Article, New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(b) Except as to the unappropriated flood waters thereof, the apportionment of which is included in and provided for by paragraph (f) of this Article, the beneficial consumptive use of the waters of the Delaware River is hereby apportioned to Texas, and the quantity of such beneficial consumptive use shall be included in determining waters received under the provisions of paragraph (a) of this Article.

(c) The beneficial consumptive use of water salvaged in New Mexico through the construction and operation of a project or projects by the Unted States or by joint undertakings of Texas and New Mexico, is hereby apportioned forty-three per cent (43%) to Texas and fifty-seven per cent (57%) to New Mexico.

(d) Except as to water salvaged, apportioned in paragraph (c) of this Article, the benefical consumptive use of water which shall be non-beneficially consumed, and which is recovered, is hereby apportioned to New Mexico but not to have the effect of diminishing the quantity of water available to Texas under the 1947 condition.

(e) Any water salvaged in Texas is hereby apportioned to Texas.

(f) Beneficial consumptive use of unappropriated flood waters is hereby apportioned fifty per cent (50%) to Texas and fifty per cent (50%) to New Mexico.

ARTICLE IV

(a) New Mexico and Texas shall cooperate to support legislation for the authorization and construction of projects to eliminate non-beneficial consumption of water.

(b) New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity conditions of the Pecos River.

(c) New Mexico and Texas each may:

(i) Construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

(ii) Construct additional reservoir capacity for the utilization of water salvaged and unappropriated flood waters apportioned by this Company [sic] to such state.

(iii) Construct additional reservoir capacity for the purpose of making more efficient use of water apportioned by this Compact to such state.

(d) Neither New Mexico nor Texas will oppose the construction of any facilities permitted by this Compact, and New Mexico and Texas will cooperate to obtain the construction of facilities that will be of joint benefit to the two states.

(e) The Commission may determine the conditions under which Texas may store water in works constructed in and operated by New Mexico.

(f) No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.

(g) New Mexico and Texas each has the right to construct and operate works for the purpose of preventing flood damage.

(h) All facilities shall be operated in such manner as to carry out the terms of this Compact.

ARTICLE V

(a) There is hereby created an interstate administrative agency to be known as the "Pecos River Commission." The Commission shall be composed of one Commissioner representing each of the states of New Mexico and Texas, designated or appointed in accordance with the laws of each such state, and, if designated by the President, one Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the two states. On or before November 1 of each even numbered year the Commission shall adopt and transmit to the Governors of the two states and to the President a budget covering an estimate of its expenses for the following two years. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and

accounting procedures of either of the two states. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in, and become a part of, the annual report of the Commission.

(c) The Commission may appoint a secretary who, while so acting, shall not be an employee of either state. He shall serve for such term, receive such salary, and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact. In the hiring of employees the Commission shall not be bound by the civil service laws of either state.

(d) The Commission, so far as consistent with this Compact, shall have power to:

1. Adopt rules and regulations;

2. Locate, establish, construct, operate, maintain, and abandon watergaging stations, independently or in cooperation with appropriate governmental agencies;

3. Engage in studies of water supplies of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

4. Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

5. Make findings as to any change in depletion by man's activities in New Mexico, and on the Delaware River in Texas;

6. Make findings as to the deliveries of water at the New Mexico-Texas state line;

7. Make findings as to the quantities of water salvaged and the amount thereof delivered at the New Mexico-Texas state line;

8. Make findings as to quantities of water non-beneficially consumed in New Mexico;

9. Make findings as to quantities of unappropriated flood waters;

10. Make findings as to the quantities of reservoir losses from reservoirs constructed in New Mexico which may be used for the benefit of both states, and as to the share thereof charged under Article VI hereof to each of the states;

11. Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

12. Perform all functions required of it by this Compact and do all things necessary, proper or convenient in the performance of its duites hereunder, independently or in cooperation with appropriate governmental agencies;

13. Make and transmit annually to the Governors of the signatory states and to the President of the United States on or before the last day of February of each year, a report covering the activities of the Commission for the preceding year.

(e) The Commission shall make available to the Governor of each of the signatory states any information within its possession at any time, and shall always provide free access to its records by the Governors of each of the states, or their representatives, or authorized representatives of the United States.

(f) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(g) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

ARTICLE VI

The following principles shall govern in regard to the apportionment made by Article III of this Compact:

(a) The Report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.

(b) Unless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of water salvaged, and quantities of unappropriated flood waters shall be determined on the basis of three-year periods reckoned in continuing progressive series beginning with the first day of January next succeeding the ratification of this Compact.

(c) Unless and until a more feasible method is devised and adpoted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.

(ii) Measure at or near the Avalon Dam in New Mexico the quantities of water salvaged.

(iii) Measure at or near the state line any water released from storage for the benefit of Texas as provided for in subparagraph (d) of this Article.

(iv) Measure the quantities of unappropriated flood waters apportioned to Texas which have not been stored and regulated by reservoirs in New Mexico.

(v) Measure any other quantities of water required to be measured under the terms of this Compact which are susceptible of being measured by the inflow-outflow method.

(d) If unappropriated flood waters apportioned to Texas are stored in facilities constructed in New Mexico, the following principles shall apply:

(i) In case of spill from a reservoir constructed in and operated by New Mexico, the water stored to the credit of Texas will be considered as the first water to spill.

(ii) In case of spill from a reservoir jointly constructed and operated, the water stored to the credit of either state shall not be affected.

(iii) Reservoir losses shall be charged to each state in proportion to the quantity of water belonging to that state in storage at the time the losses occur.

(iv) The water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas.

(e) Water salvaged shall be measured at or near the Avalon Dam in New Mexico and to the quantity thereof shall be added a quantity equal to the quantity of salvage water depleted by man's activities above Avalon Dam. The quantity of water salvaged that is apportioned to Texas shall be delivered by New Mexico at the New Mexico-Texas state line. The quantity of unappropriated flood waters impounded under paragraph (d) of this Article, when released shall be delivered by New Mexico at the New Mexico-Texas state line in the quantity released less channnel losses. The unappropriated flood waters apportioned to Texas by this Compact that are not impounded in reservoirs in New Mexico shall be measured and delivered at the New Mexico-Texas state line.

(f) Beneficial use shall be the basis, the measure, and the limit of the right to use water.

ARTICLE VII

In the event of importation of water by man's activities to the Pecos River Basin from any other river basin the state making the importation shall have the exclusive use of such imported water.

ARTICLE VIII

The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

ARTICLE IX

In maintaining the flows at the New Mexico-Texas state line required by this Compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

ARTICLE X

The failure of either state to use the water, or any part therof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use, nor shall it constitute a forfeiture or abandonment of the right to such use.

ARTICLE XI

Nothing in this Compact shall be construed as;

(a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);

(b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any state or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(d) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this Compact.

ARTICLE XII

The consumptive use of water by the United States or any of its agencies, instrumentalities or wards, shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state.

ARTICLE XIII

This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XIV

This Compact may be terminted at any time by appropriate action of the legislatures of both of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XV

This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each State and approved by the Congress of the United States. Notice of ratification by the legislature of each State shall be given by the Governor of that State to the Governor of the other State and to the President of the United States, and the President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed three counterparts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 3rd day of December, 1948.

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1982
ALEXANDER L. STEVAS,
CLERK

No. 65, Original

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND SUPPORTING MEMORANDUM

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ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES

The United States respectfully excepts to the Report and Recommendations of the Special Master dated September 10, 1982, insofar as the Report and Recommendations propose that the United States' representative on the Pecos River Commission be vested with power to vote to resolve any impasse created by the failure of the state representatives to agree.

REX E. LEE
Solicitor General

DECEMBER 1982

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 65, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

STATEMENT

1. Texas was granted leave to file this action in 1975, 421 U.S. 927; it alleged that New Mexico had violated the Pecos River Compact, ratified by the states and consented to by Congress in 1949. Ch. 184, 63 Stat. 159. The purpose of the Compact is to apportion the water of the Pecos River between the two states. The terms of the apportionment provide that New Mexico shall not deplete the flow of the river at the state line below the amount available to Texas under the "1947 condition." Art.

III(a), 63 Stat. 161. The Special Master concluded that the phrase "1947 condition" meant "that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947 and from the augmented Fort Sumner and Carlsbad acreage." *Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact* 52 (Aug. 13, 1979).[1] That definition was approved by this Court. *Texas* v. *New Mexico*, 446 U.S. 540 (1980).

Although the standard for compliance by New Mexico with its obligations under the Compact is now fixed, there remain several issues to be resolved before it can be determined whether Texas is entitled to relief in this action. First, the definition of the 1947 condition approved by this Court must be translated into water quantities so that there is a numerical standard against which compliance in subsequent years can effectively be measured. Second, depletions in subsequent years must be determined and measured against that standard. Both the quantification of the 1947 condition and the measurement of depletions in subsequent years will necessarily involve the exercise of some judgment. The amount of water in the Pecos River varies with the annual precipitation; it also depends upon such phenomena as flood inflows to the river, channel and reservoir losses of water through evaporation and bank storage, absorption of water by phreatophytes (vegetation such as willows and salt cedars), and returns of water to the river

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[1] The phrase "1947 condition" is defined in the Compact as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee." Art. II(g), 63 Stat. 160.

after diversions. There is no generally accepted method for measurement of the effects of those phenomena, though there are a number of engineering techniques available (Report and Recommendations 13-14).

When the Pecos River Compact was adopted it was contemplated that a determination of compliance with the water delivery obligations it imposed would be made in the first instance by the Pecos River Commission. Art. V(d), VI, 63 Stat. 162-164. The Compact provides for the appointment of one Commissioner representing each of the compacting states and, if designated by the President, a third Commissioner representing the United States. "[T]he Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission." Art. V(a), 63 Stat. 162. Since 1962 administration of the Compact has been frustrated by the failure of the two state Commissioners to agree on the interpretation of the Compact's requirement.

2. The Master's Report and Recommendations were made in response to motions by the two states. New Mexico moved for a final decree and dismissal, arguing that "the Court is without power to interfere with the * * * Commission in the execution of its statutory duties, particularly the exercise of its discretion in resolving abstruse and judgmental engineering problems." Motion To Recommend Final Decree And To Dismiss And Other Motions, Memoranda, And Documents In Response To The Master's Order Of December 29, 1981, at 3. Texas moved instead that the Court adopt a new proposal for measurement of the 1947 condition. Motion To Use The Double Mass Inflow-Outflow Method To Account For Stream Flows

In The Determination Of The 1947 Condition Base Relationship. The Master recommended that

> (1) The New Mexico motion to dismiss the action be denied.
>
> (2) The Texas motion to substitute double mass analysis for river routing be denied without prejudice to consideration and action thereon by the Pecos River Commission.
>
> (3) The United States representative on the Pecos River Commission, or a third party, be vested with power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representatives of Texas and New Mexico to agree.
>
> (4) Texas and New Mexico be ordered to return forthwith to the Pecos River Commission for performance by it of the duties, and exercise by it of the powers, delegated to it by the Compact.
>
> (5) The Court retain jurisdiction of the case.

Report and Recommendations 2-3.

The Master concluded that to dismiss the action could leave Texas without a remedy, and prolong delay to the advantage of New Mexico. He found, however, that because the Commission had made no findings for him to review, further proceedings would require him to " 'exercise * * * functions which are essentially legislative or administrative,' " and beyond the judicial power. Report and Recommendations 22, quoting *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 469 (1930). The Master also decided that, even if it were in his power to proceed with the case, the intransigence of the states would frustrate the implementation by the Pecos River Commission of any decree he might recommend (Report

and Recommendations 23-24). The Master concluded that the proper action under these circumstances would be to exercise his equitable power by appointing a 'tie-breaker" if the states were unable, within 90 days, to agree on a tie-breaking procedure of their own (*id.* at 26).[2] "[T]he decision of the tie-breaker [would be] final, subject only to appropriate review by the Court. Upon the selection of a tie-breaker, the States should be ordered to return to the Commission for determination of this long-standing controversy." (*ibid.*).

ARGUMENT

We believe the Master erred in recommending the appointment of a tie-breaker to the Pecos River Commission, since the Compact denies the United States representative a vote, and the Compact has the force of statutory law. We also believe that translating the 1947 condition into quantities of water and proposing a method for measurement of depletions in subsequent years are proper judicial functions. Finally (though an answer to this question rests ultimately with the states), we believe that disagreement between the states need not frustrate future compliance with any decree the Master might recommend and the Court approve.[3]

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[2] The Master gave the states "a reasonable time, say ninety days," within which to agree on such a procedure (*ibid.*). The ninety-day period will expire on December 9, 1982.

[3] Although the United States initially intervened in this matter to protect certain federal and Indian water rights (see 423 U.S. 1085 (1976)), it has now been determined that the resolution of this dispute will not substantially affect the interests of the United States. Accordingly, the United States has generally acted as an observer in the proceedings before the Special Master and has actively participated only to the extent requested by the Special Master. We have never-

I. THE TERMS OF AN INTERSTATE COMPACT CANNOT BE MODIFIED BY JUDICIAL ACTION

Article V(a) of the Pecos River Compact provides that "the Commissioner representing the United States * * * shall not have the right to vote in any of the deliberations of the Commission." 63 Stat. 162. That section makes explicit the intent of the compacting states, approved by Congress, that only the state Commissioners should have the right to vote on matters within the Commission's jurisdiction. This Court recently held that "congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States * * *." *Cuyler* v. *Adams*, 449 U.S 433, 438 (1981). Through that device "the Framers sought to ensure that *Congress* would maintain ultimate supervisory power over cooperative state action * * *." *Id.* at 440 (emphasis added). In this case the Compact itself also provides for termination by legislative action in each of the signatory states, Art. XIV, 63 Stat. 165, but does not contemplate judicial modification. As events have demonstrated, it would have been preferable had the Compact included a method for resolution of deadlocks between the state Commissioners. But that defect cannot be judicially corrected. The Court can no more vary the terms of the Compact than it can amend any other statute enacted by Congress. Even if, in extraordinary circumstances, the Court might be constrained to disregard an interstate compact as unenforceable and invoke principles of equitable apportionment in dividing the waters of an interstate stream, it

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theless submitted this Exception and Supporting Memorandum because of the Master's recommendation that the Commissioner representing the United States be empowered to vote on matters before the Pecos River Commission.

does not follow that rewriting the terms of the compact is a permissible alternative.

At all events, there are independent objections to the judicial appointment of an impartial third party to resolve the states' differences. So long as such an individual was empowered to act he would of necessity be subject to control by this Court, which has frequently noted the undesirability of "continuing Court supervision over decrees of equitable apportionment of waters * * *." *Vermont* v. *New York*, 417 U.S. 270, 275 (1974). Moreover, although (as we argue in the following section) much that the Commissioners do is the appropriate subject of judicial action, the Compact also gives the Commission functions which are discretionary and inapt for judicial review by any manageable standards. Article VI(b), 63 Stat. 163, for example, declares that "[u]nless otherwise determined by the Commission," measurements shall be made on the basis of three-year periods. And Article VI(c), 63 Stat. 163, states that "[u]nless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method" shall be used to make measurements of stream flows. Insofar as the tie-breaker is permitted to participate in such decisions, he "would be acting more in an arbitral rather than a judicial manner," and his action would not be subject to review "according to principles of law * * *." *Vermont* v. *New York*, *supra*, 417 U.S. at 277.

II. THE JUDICIAL POWER EXTENDS TO THE INTERPRETATION OF COMPACT TERMS, AND DETERMINATION OF COMPLIANCE WITH ITS REQUIREMENTS, WHERE THE COMMISSION HAS FAILED TO ACT

1. The Master concluded that appointment of a tie-breaker to the Pecos River Commission was necessary in part because the choice among methods for stream-flow measurement required the application of judgment and scientific expertise which are not the usual preserve of the judiciary (Report and Recommendations 21). While that is unhappily true, suits involving the apportionment of interstate waters have always presented this Court with the necessity of making such choices. As the Court stated in *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945):

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and the rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue.

Compared to such a welter of considerations, each measured only against the Chancellor's foot, the requirement that New Mexico deliver water according to the 1947 condition is relatively straightforward.

Aware of the difficulties inherent in equitable apportionment, this Court has in the past stressed its

preference for resolving disputes over interstate streams through compacts, rather than through the elaboration of federal common law. *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 26-27 (1951); *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943). But the effectiveness of interstate compacts depends in the last instance on their enforceability. "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States." *West Virginia ex rel. Dyer* v. *Sims*, *supra*, 341 U.S. at 28. Cf. *Arizona* v. *California*, 373 U.S. 546, 564 (1963).

2. Apart from the difficulty of making scientific judgments, the Master concluded that judicial enforcement of the Compact was also inappropriate at this point because the choice of methodology and values "should be made in the first instance by the administrative agency and then be subjected to judicial review" (Report and Recommendations 22). But the Compact's grant of factfinding power to the Pecos River Commission does not preclude the judicial power to make similar determinations. The Compact grants the Commission power to collect data and make factual findings concerning New Mexico's compliance with its delivery obligations. Art. V(d), VI, 63 Stat. 162-164. That power, however, is nowhere made exclusive.[4] Moreover, it is clear that the Compact contemplates judicial enforcement, since the Commission is given no enforcement power, and Article

[4] Those decisions which *were* to be the sole province of the Commission were explicitly identified. See, e.g., Art. VI(b) and (c), *supra*, page 7.

V(f), 63 Stat. 163, states that "[f]indings of fact made by the Commission shall not be conclusive in any court, * * * but shall constitute prima facie evidence of the facts found."

It is probable that those who drafted the Compact envisioned a two-stage enforcement procedure, with measurement of depletion being made in the first instance by the Commission. But it would be unrealistic to suppose that that approach was intended to be exclusive. The compact is, after all, "a law of the United States," *Cuyler* v. *Adams*, *supra*, 449 U.S. at 438, and as such creates federal rights in the compacting states. See *Delaware River Commission* v. *Colburn*, 310 U.S. 419, 427 (1940). On the other hand, "[i]n discharging their duties as officials of [the Commission], the state * * * appointees necessarily have also served the interests of the political units that appointed them." *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U.S. 391, 399 (1979). Because the Compact gives each state one of the Commission's two votes, making Commission action an absolute prerequisite to judicial relief would permit a partisan state appointee to frustrate the enforcement of a federal right. Though the problem presented by this case is in some respects unique, it has obvious parallels in both public and private law.

a. The argument that the Master should refer decision on measurement of the 1947 condition and of depletion changes to the Commission is similar to the doctrine of primary jurisdiction applied in *Far East Conference* v. *United States*, 342 U.S. 570 (1952). The Court there held that in cases raising factual issues not within the usual experience of the judiciary, agencies established to make such determinations should first decide those issues. That pro-

cedure is favored even though the agency is not capable of granting the relief sought in court, and its factual determinations will only serve as a predicate for judicial action. *Id.* at 574-575. See also *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). But the doctrine is not an inflexible requirement even where the agency to which a court defers is federal in composition and implements federal statutory policy. For example, where there are "no pervasive regulatory scheme, and no rate structures to throw out of balance," this Court has declined to require remand to an agency. *United States* v. *RCA*, 358 U.S. 334, 350 (1959). Moreover, "[s]ince * * * the doctrine of primary jurisdiction rests in part upon the need for the skill of a 'body of experts,' it would be odd to impose the doctrine when the experts deny the relevance of their skill." *Ibid.*, n.18. But it would be equally quixotic to impose the doctrine when the experts are deadlocked and unable to exercise their skill. See *United States* v. *Grace & Sons, Inc.*, 384 U.S. 424, 430 (1966); *Walker* v. *Southern Ry.*, 385 U.S. 196, 198 (1966); cf. *Rosado* v. *Wyman*, 397 U.S. 397, 405-407 (1970).

The question is similar to that presented in *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823). There Virginia and Kentucky had provided by compact that—upon the separation of Kentucky from Virginia and its admission to statehood—pre-existing private rights in lands within Kentucky should be determined by the law of Virginia. Article VIII of the compact provided for the constitution of a special tribunal for the resolution of disputes about the interpretation and execution of the compact. 21 U.S. (8 Wheat.) at 38, 46-48. To the argument that the provision for such a tribunal prevented this Court from exercising its ju-

risdiction over a dispute arising under the compact, the Court answered (*id.* at 90-91):

> How, then, are those controversies * * * to be settled? The answer, we presume, would be, by commissioners, to be appointed by those states. But none such have been appointed; what then? Suppose, either of those states, Virginia, for example, should refuse to appoint commissioners? Are the occupants of lands, to which they have no title, to retain their possessions, until this tribunal is appointed, and to enrich themselves in the mean time, by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained.

There is little difference between the refusal to appoint commissioners, and the appointment of commissioners who refuse to find facts about the extent of compliance. Whether such a deadlock will persist in the Commission's deliberations now that the 1947 condition has been defined (though not quantified) is a matter which the United States is not qualified to assess. The Court should consider that question in light of the submissions of Texas and New Mexico. If such an impasse is perceived as inevitable, however, there is no lack of judicial power to proceed with interpretation and enforcement of the Compact.

b. Still another perspective on the same problem may be gained from the standpoint of private law. Although congressional approval renders a compact a federal law, the underlying transaction is still an agreement between two states which is in form and substance a contract. F. Zimmerman & M. Wendell, *The Interstate Compact Since 1925* at 32, 42 (1951). Indeed, in *Green* v. *Biddle*, *supra*, this Court found

that "[i]f we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous * * *." 21 U.S. (8 Wheat.) at 92. The Court went on to hold that statutes enacted by Kentucky interfering with the rights created by the compact were "Law[s] impairing the Obligation of Contracts" in violation of the Contract Clause, United States Constitution, Article I, Section 10. 21 U.S. (8 Wheat.) at 92-93.

In many ways the provision in the Compact for determination of compliance by the Commission is similar to the provision typically found in construction contracts that performance be assessed and certified by an architect or engineer. In such cases the courts frequently hold that an action to enforce the obligation of payment is demurrable unless the complaint alleges the execution of the certificate of performance. See, e.g., *Peacock Construction Co.* v. *West*, 111 Ga. App. 604, 606-607, 142 S.E.2d 332, 333-334 (Ct. App. 1965); *Neale Construction Co.* v. *Topeka Township Sewage District*, 178 Kan. 359, 362-366, 285 P.2d 1086, 1089-1092 (1955); 3A A. Corbin, *Corbin on Contracts* § 650, at 115-116 (1960).[5] Nevertheless, the duty to obtain an initial determination of com-

[5] That is so even though, as here, the architect's assessment of compliance with the contract is only prima facie evidence that the work has been performed as required. See, e.g., *Plantation Foods, Inc.* v. *R.J. Reagan Co.*, 520 S.W.2d 432 (Tex. Civ. App. 1975); *James I. Barnes Construction Co.* v. *Washington Township*, 134 Ind. App. 461, 466-467, 184 N.E.2d 763, 764-765 (Ct. App. 1962); 17A C.J.S. *Contracts* § 498, at 744 (1963).

pliance with the contract can be excused, and judicial enforcement sought directly, under circumstances similar to those which may obtain in this case:

> Where a certificate of an architect, surveyor or engineer is a condition precedent to a duty of immediate payment for work, the condition is excused if the architect, surveyor or engineer
>
> (a) dies or becomes incapacitated, or
>
> (b) refuses to give a certificate because of collusion with the promisor, or
>
> (c) refuses to give a certificate after making examination of the work and finding it adequate, or
>
> (d) fails to make proper examination of the work or
>
> (e) fails to exercise an honest judgment * * *.

Restatement of Contracts § 303 (1932). In such situations, even though "[j]udges and juries may not be competent architects or skilled in determining conformity with plans and specifications," 3A *Corbin on Contracts* § 651, at 118, factual questions about performance fall to them of necessity. *Id.* at 120.

In this case the Compact provision for Commission factfinding plays the same role as an architect's certificate. When functioning properly the Commission is able to provide an expert assessment of performance in accordance with the Compact's 1947 condition which would materially assist the Master and this Court in deciding whether New Mexico has performed her obligations. The inability of the Commission to act, however, does not render the Compact unenforceable. Rather, it is properly viewed as

a condition precedent to contractual enforcement which may in proper cases be excused.

3. Issuance of a decree in this action would be proper even though its enforcement may be attended by some administrative difficulty. Once again it is worth emphasizing that enforcement of the Compact's provisions may be a less difficult undertaking than, for example, enforcement of a decree of equitable apportionment. Such decrees have historically required frequent judicial intervention to make them effective. See, e.g., *Wyoming* v. *Colorado*, 259 U.S. 419 (1922); 260 U.S. 1 (1922); 286 U.S. 494 (1932); 298 U.S. 573 (1936); 309 U.S. 572 (1940); 353 U.S. 953 (1957). Cf. *New Jersey* v. *New York*, 347 U.S. 995, 1002-1003 (1954) (appointment of River Master to administer provisions of decree regarding the yields, diversions, and releases on Delaware River). Moreover, this Court has emphasized, in the context of interstate compacts, "[t]hat judicial power essentially involves the right to enforce the results of its exertion * * * [, and] that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this court by the Constitution * * *." *Virginia* v. *West Virginia*, 246 U.S. 565, 591 (1918).

Of course such continuing supervision is undesirable. See *Vermont* v. *New York*, *supra*, 417 U.S. at 274-275; *Nebraska* v. *Wyoming*, *supra*, 325 U.S. at 616. But there is good reason to hope that it will also be unnecessary. In the first place, this Court has generally entertained the expectation that states will resolve their differences through "mutual accommodation and agreement," *Arizona* v. *California*, 373 U.S. 546, 564 (1963); *Vermont* v. *New York*, *supra*, 417 U.S. at 274, and its confidence has proven justified. Equally important in this case, the Court has already

sustained the Master's definition of the 1947 condition, so the ground which separates the states is not as wide as it once was. The Master could, we think, properly specify the accounting techniques to be used and the assumptions to be made about stream flows in determining future compliance, so that the findings to be made by the Commission would be confined largely to matters of empirical fact. Such a decree would not necessarily undermine the role assigned to the Commission by the Compact, since the Commission could be left free—whenever it was able to agree—to make different judgments of value (as well as fact), to devise an alternative to the inflow-outflow method, and to exercise its other powers. The decree would simply provide a modus vivendi while the Commission was deadlocked.

* * * * *

We emphasize that the United States is not well situated to assess the prospects of future agreement between the states or their Commissioners. If the main parties should convince the Court that their differences have been narrowed sufficiently for the Commission to operate with unanimity, it may be proper to enforce the Master's fourth recommendation notwithstanding the fact that a tie-breaker cannot be appointed. If, on the other hand, the states have concluded that they cannot abide by the terms of the Compact, they remain free to terminate it "by appropriate action of the legislatures of both of the signatory states." Art. XIV, 63 Stat. 165. If neither of those resolutions proves possible or desirable, however, the judicial power extends to resolution of the factual and policy disputes delegated to the Commission, and may be exercised to remedy the impasse

arising from the Compact's requirements of unanimous action by the compacting states.

CONCLUSION

The Exception of the United States should be sustained. In other respects, the Court should act on the recommendations of the Special Master as it deems appropriate in light of the submissions of the compacting states.

Respectfully submitted.

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